IN THE COURT OF APPEAL

AT MOMBASA

(Coram:gachuhi, Gicheru & Kwach JJ A)

CIVIL APPEAL NO 15 OF 1989

SHARIFFSALIM & ANOTHER..............................APPELLANT

V ERSUS

MALUNDU KIKAVA ....RESPONDENT

JUDGMENT

(Appeal from the judgment and decree of the High Court at Mombasa, Bosire J,

in HCCC No 865 of 1983 dated 9th November 1987)

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October 13, 1989 the following Judgment of the Court was delivered.
On March 18, 1983, Shariff Salim (the first appellant), was driving a motor vehicle registration number KTB 115 owned by Simbarite Ltd (the second appellant), in the course of his employment with the second appellant, along Nyali Road in the direction of Bahari Club, when he was involved in a collision with a cyclist, Malundu Kikava (the respondent), in consequence whereof the respondent sustained personal injuries and material damage to his bicycle. He brought an action for damages against the appellants. The trial judge after hearing evidence apportioned contributory negligence between the first appellant and the respondent at 25% and 75% respectively. He made an order for interest to be charged on damages from the date of the suit until payment in full.

The appellants appealed against the decision of the High Court on a number of grounds but before setting them down, we think we should refer to one other matter which ultimately became the focal point of argument in this appeal and also before the trial judge.

On June 24, 1983, the respondent appeared before a District Magistrate at Mombasa on a charge of careless riding contrary to section 87(1) of the Traffic Act (cap 403). He was convicted on his own plea of guilty and fined Kshs 75 and in default to serve 10 days in a detention camp. The facts as stated by the prosecutor and accepted by the respondent were that:-

> “On March 18, 1983, at about 1 pm, the motorist driving motor vehicle KTB 115 Toyota was coming from Tononoka side along Tom Mboya Avenue. On reaching the junction of Tom Mboya avenue and Abdel Nasser road, the pedal cyclist shot from the old Nyali bridge road joining the main road. The motorist applied emergency brakes but it was too late and collided

> with the pedal cyclist. The pedal cyclist who is now the accused sustained a fracture of his right leg and a cut on his face. His bicycle was extensively damaged while the motor vehicle received minor damages. The injured accused was rushed to the hospital and admitted for more than a month. From the observation of the scene and investigation it was revealed that the cyclist was to blame as he shot from a minor road into a major road without first checking that it was safe to do so. The motor vehicle was taken for inspection and found to have no defects"

When the District Magistrate asked the accused (respondent) whether he admitted the facts as stated by the prosecutor, his response was: "I admit those facts are true." Whereupon a conviction was entered followed by sentence. The summary of facts in the traffic case was only one version of how the accident happened.

The second version was given by the respondent before the High Court when he testified that:

> "I was cycling towards Bahari Club. Motor vehicle came from behind me heading the same direction. Panicked and jumped off – to left side. Vehicle was directly heading towards me that is why I panicked. Motor vehicle hit one wheel of my bicycle together with one of my legs. I fell down ..."

It is to be noted that this version given by the respondent at the trial of his action was directly at variance with the account given before the district magistrate at the respondent's trial for careless riding. We shall come back to this shortly.

The first appellant also gave evidence before the High Court and his account as to what happened on March 18, 1983, was in accord in every material respect with the summary given by the prosecutor at the trial of the respondent the truth of which was, as we have already said, accepted by the respondent.

From the foregoing, it is clear that the judge was faced with conflicting evidence on a material point and it was therefore incumbent upon him to make a finding as to whose and which version he accepted as true. We have studied the judgment with great care but we can find no such finding. In their memorandum of appeal, the appellants have listed 12 grounds of appeal but these can be condensed to 4 grounds, namely:

> (1) "The learned judge erred in law and on facts after finding that the respondent had been convicted of offence of careless riding in failing to hold that the said suit filed by the respondent did not disclose any reasonable cause of action against the appellants;
> (2) The learned judge erred in law and on facts in making a finding or by holding that the first appellant had contributed to the accident by his negligence when there was no evidence adduced of any negligence or contributory negligence on the part of the first appellant;
> (3) The award of shs 80,000 is so inordinately high that it amounts to a wholly erroneous estimate of damages suffered by the respondent; and
> (4) The learned judge erred in law in awarding interest on general damages from the date of filing suit until payment in full."

We propose to deal with these 4 grounds in their serial order. On the first ground of appeal, Mr Khanna, for the appellants, submitted that since the respondent had pleaded guilty of careless riding which involved a considerable degree of negligence on his part, the respondent could not have any cause of action against the appellants which was in effect based on his own negligence. He submitted that contributory negligence is a defence and cannot form a foundation for a claim in negligence. He referred us to a number of authorities in support of his submissions on this point. While we agree with Mr Khanna that contributory negligence can only be used as a shield and not as a sword, we cannot accept his submission that a party who has partly contributed to his own misfortune cannot bring an action for damages against any other person who has also contributed to the cause of the accident through an act of negligence on his part. He referred us to the case of *Robinson v Oluoch* [1971] EA 376. In that case the respondent appeared and filed a defence in a suit arising out of a motor accident some five months after

summons had been served. The appellant applied to strike out the appearance and defence. His application was dismissed and on appeal to the Court of Appeal for East Africa, the appellant also argued a point not dealt with in the court below namely, that the respondent's conviction for careless driving in connection with the accident the subject of the suit was conclusive evidence of his sole negligence under section 47A of the Evidence Act (cap 80) which is in the following terms:

> "47A. A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person convicted was guilty of that offence as charged."

The court held that it is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident. In the present case the basis of the respondent's claim was not his own negligence but the negligence the responsibility for which he attributed to the first appellant. This would seem to us to be in full accord with section 4(1) of the Law Reform Act (cap 26) which provides as follows:

> "4(1) Where any person suffers damage as a result partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of that person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

This provision in our judgment clearly covers a plaintiff (claimant) who has himself been guilty of contributory negligence. Section 4(1) of the Law Reform Act (cap 26) is identical to section 1 of the English Law Reform (Contributory Negligence) Act 1945, whose object was stated by Lord Pearce in his speech in the case of The *Miraflores and the Abedesa* (1967) 3 All ER 672, when he said:

> "Its intention was to allow a plaintiff, though negligent, to recover damages reduced to such an extent as the court thinks just and equitable having regard to his share in the responsibility for the damage (section 1(1)). But that share can only be estimated by weighing his fault against that of the defendant or, if there are two defendants, against that of each defendant."

The claim in that case arose out of a collision between two ships, the steam tankers Miraflores and Abedesa. In avoiding becoming involved in that collision, the steam tanker George Livanos ran aground and sustained damage. The owners of the *George Livano*s brought an action against the owners of both the *Miraflores* and the *Abedesa* in respect of her grounding. In respect of this action, it as held that the *George Livanos* had herself been negligent.

It is clear from the foregoing that a plaintiff who has suffered damage partly from his own negligence and partly from the negligence of any other person can bring an action for damages against that other person subject to apportionment of contributory negligence between them. The first ground of appeal accordingly fails.

In the second ground of appeal, the complaint is that there was no evidence to sustain the finding by the trial judge that the first appellant was guilty of contributory negligence. We have already pointed out that there were three accounts of the accident given by the prosecutor at the trial of the respondent; by the respondent in his evidence before the judge and by the first appellant at the trial which has given rise to this appeal. The version given by the first appellant agreed in every respect with the summary of facts given by the prosecutor and which the respondent also had confirmed to the District Magistrate to be true and correct and on the basis of which he was convicted and sentenced. The account given by the respondent before the judge was directly at variance with both the prosecutor's summary before the district magistrate and the version given by the first appellant before the judge. Before the judge could

make any proper adjudication on the issue of negligence as between the first appellant and the respondent, he was bound to consider the evidence before him and make a finding as to which version he accepted as true. On a balance, and having considered the evidence on record fully, we think that the account given by the first appellant was more consistent with the truth and was in conformity in material particulars with the version given by the prosecutor and confirmed to be true by the respondent at his trial. That summary of facts leaves no room for any doubt that the accident was caused wholly by negligence on the part of the respondent. There is nothing in that summary to suggest, or from which it can be reasonably inferred that the first appellant was in any way to be blamed for the collision. We agree therefore with Mr Khanna that the finding by the judge that the first appellant was guilty of contributory negligence was not based on any credible evidence. There was no material before the judge on which he could properly form that view. It was made without any factual basis and was consequently erroneous. This ground, which in fact determines the crucial issue of liability, accordingly succeeds. Although the conclusion we have arrived at on this ground is sufficient to dispose of this appeal, we propose to deal briefly with the remaining two grounds of appeal out of deference to counsel and as a mark of appreciation on our part for their industry in preparation and presentation of their arguments in this appeal.

Mr Khanna submitted that the award of Kshs 80,000, was far too high bearing in mind comparative awards in similar cases and the injuries sustained by the respondent. Having considered the matter ourselves, we are unable to say that the judge fell into any error when he awarded the respondent Kshs 80,000 for the injuries which he sustained as a result of the accident. This ground of appeal accordingly fails.

The last ground of appeal relates to the order made by the judge awarding interest on general damages from the date of filing suit until payment in full. It was the submission of learned counsel for the appellant before us that interest should have been awarded from the date of judgment.

The power to award interest is given to the court under section 26(1) of the Civil Procedure Act (cap 21) which provides:

> "26(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."

There is no gainsaying the fact under section 26 of the Civil Procedure Act, the award of interest on a decree for the payment of money for the period from the date of the suit to the date of the decree is a matter entirely within the discretion of the court. But this discretion being a judicial one must be exercised judicially. The whole idea at the end of the day is to do justice to both parties. In the case of *Prem Lata v Peter Musa Mbiyu* [1965] EA 592, the appellant, in a suit for damages for personal injuries, was awarded Kshs 24,000, as general damages and shs 1,742.80 as special damages but the judge refused an application to award interest on these two sums from the date of filing suit until judgment. On appeal, the Court of Appeal for East Africa held that in personal injury cases, interest on general damages should not be awarded for the period between the date of filing suit and judgment but that interest should normally be awarded on special damages if the amount claimed has been actually expended or incurred at the date of filing the suit.

This point was also dealt with by the Court of Appeal for East Africa in the case of *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited* [1970] EA 469. In that case, the appellant, a company manufacturing biscuits entered into a contract with the respondent whereby it was to be the sole distributor for the appellant's biscuits for a period of three years. On the termination of the agreement by the appellant, the respondent sued for damages and account. The High Court found there was a contract and awarded general damages with interest from the date the contract would have expired. The appellant appealed alleging among other things that the judge erred in awarding interest for a period prior to judgment. The court held, allowing the appeal, that while the judge had power to award interest

from a date prior to judgment, where damages have to be assessed by the court, interest should only be given from the date of judgment.

One other case on this point we would like to refer to is the case of *Dipak Emporium v Bonds Clothing* [1973] EA 553. In that case the High Court awarded the respondents damages for the infringement of their trade mark and passing off by the appellants and awarded interest on the damages from the date of filing suit. On appeal by the appellants to the Court of Appeal for East Africa, the appeal was allowed, it being held that as it was not shown that the respondents had suffered any definite fixed and ascertainable loss the award of interest should have been from the date of assessment.

In the course of his judgment, with which both Spry V P, and Musoke JA, agreed, Duffus, P, said at p 558 E:

> "The English cases are based on English law which is not the same as our law in Kenya. Our law on interest is based only on section 26(1) of the Civil Procedure Code. This section does, undoubtedly, give the trial court a very wide discretion in awarding interest and our judgments in *Prem Lata* case and in the *Mukisa* case do not cover all the possible situations that might arise. They do however lay down certain general principles which should be followed."

Applying these general principles as laid down in the decided cases how does the matter stand in this case? Granted that the learned judge had a very wide discretion in the matter, what we have to decide is whether he exercised that discretion correctly. After adding up the figures for special and general damages, he simply ordered:

> "Costs and interest on the figure from the date of the suit until payment in full."

The judge gave no reason for ordering that interest even on general damages was to be paid from the date of filing the suit. According to the authorities interest on general damages should be paid from the date of assessment which of course is the date of judgment. That is the earliest date when the defendant's liability to pay does arise. That order even in relation to payment of interest on special damages is, in our view, unsupportable. Quite apart from the fact that the claim for special damages was not proved by any evidence beyond being itemized in the plaint, except for shs 100, paid for police abstract, the remaining items had not been paid for at the date of the filing of the suit on August 19, 1983. As a result, it is impossible to ascertain the reasons which compelled the judge to award interest from the date of filing suit and this leads us to the inevitable conclusion that the learned judge wrongly exercised his discretion. This ground of appeal accordingly succeeds.

For the reasons we have given, we allow this appeal, set aside the judgment and decree of the High Court and substitute therefor an order dismissing the respondents' suit with costs. The appellants will also have the costs of this appeal. Orders accordingly.

Dated and delivered at Mombasa this 13th October , 1989

J.M GACHUHI

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JUDGE OF APPEAL

J.E GICHERU

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JUDGE OF APPEAL

R.O KWACH

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR